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INTERPRETATIVE BULLETIN

Extent to which Policy-Making Officials
May Act or Speak in Support of or Opposition to
Ballot Questions

This Office has recently received several inquiries as to the extent to which a policy-making official may utilize governmental resources¹ when speaking or acting in support of or opposition to a question submitted to the voters (hereinafter "ballot question"). For the purpose of this memorandum a policy-making official includes constitutional officers, cabinet secretaries, commissioners, departments heads as well as other persons who have a major policy-making position at the state, county and municipal level (hereinafter collectively referred to as "policy-making officials." In most cases, the phrase policy-making official would, in OCPF's opinion, include any official in a position classified as a major policy making position pursuant to M.G.L. c. 268B, s.1.

I. GENERAL DISCUSSION

In the case of Anderson v. City of Boston, 376 Mass. 178 (1978), the Supreme Judicial Court concluded that the campaign finance law, M.G.L. c.55, was meant to be a comprehensive statute regulating all campaign finance matters including the use of governmental resources to support or oppose a ballot question. The court found that the lack of statutory provisions applicable to the use of governmental resources reflected the fact that "G.L.c.55 [was] intended to reach all political fund raising and expenditures within the Commonwealth." Anderson, 376 Mass. at 186. In short, what was

1. OCPF defines "governmental resources" very broadly to include personnel, paper, stationery, and other supplies; offices, meeting rooms and other facilities; copiers, computers, telephones, fax machines; and automobiles and other equipment purchased or maintained by the commonwealth or any of its subdivisions or authorities or at their expense.

not expressly authorized was prohibited.²

In accordance with the Anderson decision this Office has consistently ruled that governmental entities may not contribute anything of value in support of or opposition to a ballot question. See IB-91-01 and advisory opinions cited therein. In addition, public resources may not be used to distribute even admittedly objective information regarding a ballot question unless expressly authorized by state law. See Secretary of State's Election Division Memorandum dated July 26, 1991.

In OCPF's opinion, however, the Anderson case does permit policy-making officials to "act and speak," subject to certain limitations, in reference to ballot questions.³ As the Anderson court noted with apparent approval:

At oral argument, the plaintiffs conceded that the mayor and persons in relevant policy-making positions in . . . government are free to act and speak out in support [of a ballot question]. Id. at 199 (emphasis added).

In OCPF's opinion, policy-making officials at the state, county and municipal level have certain limited rights to act and speak out in regards to ballot questions. If policy-making officials were prohibited from stating their positions regarding a ballot question related to their official responsibility, such a prohibition would unnecessarily (and probably unconstitutionally) restrain such officials from carrying out the duties of their offices. On the other hand, if policy-making officials could utilize governmental resources, without limitation, to promote or oppose a ballot question, the fundamental prohibition set forth in Anderson would be meaningless. The following parts of this

2. The Anderson court's holding is consistent with the requirements of M.G.L. c.55, s.7, which states, in pertinent part:

No person or combination of persons . . . shall in connection with any nomination or election receive money or its equivalent, expend or disperse or promise to expend or disperse the same, except as authorized by this chapter. (emphasis added)

3. The campaign finance law does not prohibit policy-making officials or other public employees from acting (other than in a fundraising capacity) or speaking on behalf of a ballot question on an individual basis on their own time. The law's restrictions apply when such officials or other public employees seek to use governmental resources to promote or oppose or otherwise influence a ballot question.

interpretative bulletin are designed to provide more specific guidance to policy-making officials through examples of permissible and prohibited conduct.

II. Permissible Activity

In general, policy-making officials may act or speak out in their official capacity and during work hours if in doing so they are acting within the scope of their official responsibilities. Hence, it is permissible for a policy-making official to articulate an agency's position regarding a ballot question assuming such a question is within the scope of the agency's responsibilities, or to respond, in his or her official capacity, to inquiries from concerned citizens, other governmental agencies, or the press, requesting the policy-making official's position on and/or analysis of a ballot question. Following are some specific examples of permitted speech and/or activity which are applicable to both elected and appointed officials.

Examples:

1. A policy-making official may, with the aid of her staff, respond to inquiries from the press or the public asking to know the official's position on a ballot question regarding a matter that is within the official's responsibilities. For example, if a citizen has written to the official asking her opinion, she may direct her staff to prepare a written response for her review and signature. Similarly, she may direct her press director to respond to a request from the press regarding her official position on the ballot.

2. A policy-making official may assign staff-members, or governmental units under his authority, to analyze a ballot question's policy impact on agency operations provided it relates to a matter of public policy within the scope of his agency and such agency has the statutory authority and responsibility for such action. See OCPF Ruling 90-33. Such a request is appropriate when the purpose is to analyze objectively the issues raised by the ballot question in order for the official to be better able to carry out his responsibilities. The official may not conduct such an analysis primarily to aid the proponents or opponents of a ballot question.⁴

4. If the results of the study are matters of public record they could not be disseminated to voters or a class of voters at public cost absent express statutory authorization. See Anderson, at 195. However, if a public record, such a study may be used or distributed by individuals or political committees, at private cost, subject to the relevant disclosure and other requirements of the campaign finance laws.

3. A policy-making official may have a staff speech writer draft a speech which includes her position on a ballot question whose subject matter is related to her responsibilities provided the primary purpose of the speech is not political e.g. to promote or oppose or otherwise influence a ballot question. See also Example III (1).

III. Prohibited Activity

Activities by policy-making officials acting in their official capacity are prohibited when initiated, directly or indirectly, by an official when such activities utilize governmental resources to promote or oppose a ballot question. In these situations, the policy-making official is no longer acting in a manner consistent with his or her official responsibilities. Rather, the official is acting and using governmental resources primarily, or exclusively, as an advocate for or against the ballot question. As noted in the examples and in Part IV different standards are sometimes applicable to elected officials.

Examples:

1. A policy-making official, appointed or elected, may not ask his staff speech writer to write a speech to be delivered at a political rally in support of or opposition to a ballot question.⁵ An appointed official could give such a speech on her own time using her own private resources while an elected official could give such a speech at any time provided governmental resources were not utilized.

2. An appointed policy-making official may not appear at a function which promotes or opposes a ballot question during working hours. As noted in Part IV an elected official could attend such an event even during working hours. However, public resources could not be used by either an appointed official or an elected official attending such an event (e.g., using a state-provided driver to transport the official to the event or paying for the transportation costs with public funds). The appointed official could, of course, attend the event during non-working hours.

3. A policy-making official, elected or appointed, may not mail, at public expense, a brochure containing her agency's position on a ballot question or its analysis setting forth an analysis, whether advocative or arguably objective, of a ballot question to voters or a class of voters such as the residents

5. M.G.L. c.55, s.16 provides, in pertinent part, that "[n]o person in the public service shall, for that reason, be under obligation . . . to render any political service . . .". Therefore, the official's speech writer also may not be compelled to write the speech during non-working hours.

of a particular town. See Election Division Memorandum, supra.

In the above situations the use of governmental funds or resources (e.g. staff time, postage, etc.) by a policy-making official would violate campaign finance law because public funds are being used to promote or oppose a ballot question, an impermissible political purpose. While policy making officials may undertake certain actions in their official capacity as noted above, or in their capacity as a private citizen or resident, neither they nor any other public employee may use public funds or resources to promote, oppose or otherwise influence a ballot question.

IV. Elected Officials

As noted in Part III, elected officials have additional rights, in OCPF's opinion, to address policy and political matters which are also the subject of a ballot question. This is due to a number of factors. The inherent nature of an elected official's responsibilities require the official to formulate and provide leadership on such matters. In addition, an elected official's work and responsibility does not fall within the confines of an eight hour work day. Finally, and most importantly, unlike appointed officials elected officials answer directly to the voters. In short, elected officials are differently situated than appointed officials and, therefore, subject to somewhat different standards. See M.G.L. c.55, s.13 which exempts elected officials from the prohibition against compensated public employees (including policy-making officials) from soliciting or receiving political contributions. See also State Ethics Commission opinion EC-COI-92-12 at footnote 10 and cases cited therein.

For the above reasons, elected officials may address any matter of public policy which is also the subject matter of a ballot question on their own time or during work hours. The elected official may state his or her own position on the matter and encourage others to adopt that position. However, an elected official may not use public resources to promote or oppose a ballot question excepted as noted in this bulletin or otherwise authorized by statute. For example, an elected official could not distribute copies of a speech promoting or opposing a balloting question to voters or a class of voters at public expense.

In extraordinary circumstances, it may be appropriate for an elected public official to use public resources in an incidental manner in connection with a ballot question provided the official, or, in appropriate circumstances the official's political committee, promptly reimburses the commonwealth. Should such a circumstance arise the policy-making official is encouraged first to seek advice from OCPF.

In conclusion, while the commonwealth's residents and

citizens have the right to know a public official's position, the commonwealth's taxpayers also have the right not to have their tax dollars which have been appropriated for specific purposes used for other political purposes.

V. Enforcement

Even though the campaign finance law prohibits the use of public funds to effect a ballot question, it nonetheless provides a reporting mechanism for expenditures made by a governmental unit to promote, oppose, or otherwise influence a question submitted to the voters.⁶ If such an expenditure is made the statute requires the treasurer of the governmental unit to "file reports with the director setting forth the amount or value of every gift, payment, expenditure or contribution The statute also provides that [n]othing contained herein shall be construed as authorizing the expenditures of public monies for political purposes." M.G.L. c.55, s.22A (emphasis added). Section 22A also grants to the director of campaign and political finance the power to "order restitution of public funds . . . spent contrary to law by public officials." For state-wide ballot questions reporting must be made to the OCPF's director. In the case of a local ballot question reports are filed by "the treasurer of any city, town or other governmental unit . . . [with] the clerk of such city or town." See M.G.L. c.55, s.22A. In 1991, restitution of more than \$12,000 ordered by OCPF was paid to the commonwealth. In addition, a number of city and town clerks have issued orders of restitution as well. Section 22A also provides up to a \$10,000 fine for a violation of its reporting requirements.

It is OCPF's policy to order full restitution for any illegal expenditure of public funds used for political purposes. See AO-91-18. In addition, M.G.L. c.55, s.7, provides criminal penalties for the expenditure or disbursement of money not authorized by M.G.L. c.55. It should also be noted that the use of public resources raises issues relating to the conflict of interest law, M.G.L. c.268A, which is enforced by the State Ethics Commission. See Commission Advisory No. 4 and Conflict of Interest Opinion EC-COI-92-5. If you have questions regarding c.268A you should contact the State Ethics Commission at 727-0060.

If you have any questions or need further information regarding this interpretative bulletin or any other campaign finance matter please call OCPF at 1-800-462-OCPF or 617-727-8352.

6. Although M.G.L. c.55, s.22A, was not yet in effect at the time of the Anderson decision, the court did consider the implications of this section and found it to be consistent with its holding. See Anderson, 376 Mass. at 187-88.